

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

CLAIM NO. NEVHCV2018/0084

In the matter of an Application for
leave to apply for Judicial Review
pursuant to Rule 56(1)(1)(c) of the
Civil Procedure Rules 2000

and

In the matter of an Application for
certain Administration Orders
pursuant to Rule 56(1)(1)(b) of the
Civil Procedure Rules 2000

and

In the matter of the decision of the
Nevis Electricity Co Ltd to refuse
connection of electricity on property
owned by Gene Paul Liburd

BETWEEN:

GENE PAUL LIBURD

Applicant

and

NEVIS ELECTRICITY CO LTD

Respondent

Before:

The Hon. Mde. Justice Lorraine Williams

High Court Judge

Appearances:

Mr Patrice Nisbett & Mr Eustace Nisbett for the Applicant
Mr Brian Barnes & Ms Dia Forrester for the Respondent

2018: October, 31
2019: November

JUDGMENT

- [1] **WILLIAMS, J.:** The matter before the Court is an application for leave for Judicial Review pursuant to Civil Procedure Rules (CPR) Rule 56 made by the Applicant Gene Paul Liburd.
- [2] The Applicant applies for the following relief:
- (1) An order of Certiorari quashing the decision of the Respondent to refuse the Applicant a supply of Electricity to property registered in the Nevis Land Titles, Register Book 30 Folio 292.
 - (2) A Declaration that the Respondent's decision to refuse the Applicant's application for the installation of Electricity was irrational, ultra vires, illegal and null and void.
 - (3) A Declaration that the Respondent's decision has prevented the Applicant from renting any of the commercial buildings on the property registered in the Nevis Titles Register Book 30 Folio 292.
 - (4) A Declaration that the Respondent's decision has prevented the Applicant from occupying his residential home on the property registered in the Nevis Titles Register Book 30 Folio 292.
 - (5) A Declaration that the Nevis Electricity Company Ltd Account ID NCB578 is an account owned by Bargain House Retail Outlet Ltd, and that the Applicant bears no liability for that account.
 - (6) A Declaration that the Applicant is not personally liable for the debts of Bargain House Retail Outlet Ltd.
 - (7) An order of Mandamus requiring the Respondent to forthwith review, approve and connect the Applicant's application for Electricity supply.
 - (8) A Declaration that the Respondent's acts and/or omissions infringe the

Applicant's legitimate expectation to be treated equally and be protected under the Law.

- (9) Damages
- (10) Exemplary Damages
- (11) Aggravated Damages
- (12) Interest pursuant to section 27 of the Supreme Court Act
- (13) Interest pursuant to section 7 of the Judgments Act
- (14) Costs
- (15) Such other relief as the Court deems just.

[3] The Grounds for the Application are as follows:

- (1) That the continuing failure, refusal or delay of the Respondent in approving the Applicant's application for Electricity and/or to provide him with an Electricity supply is tantamount to an Abuse of Power.
- (2) That the continuing failure, refusal or delay of the Respondent in approving the Applicant's application for Electricity and/or to provide him with an Electricity supply is illegal and contravenes the Nevis Ordinances Cap 5.02(N) Electricity Ordinance section 24.
- (3) The Respondent's decision to treat the Applicant and the Bargain House Retail Outlet Ltd as one at Law is illegal.
- (4) The decision of the Respondent to refuse or delay the Applicant's supply of Electricity was at all times made in bad faith.
- (5) The Respondent has exercised their powers for an improper purpose, causing harm and grave financial injury to the Applicant in that the acts or omissions of the Respondent has precluded the Applicant from firstly gaining rental income from his property; secondly causing him to secure and rent alternative residences.
- (6) That the Applicant held legitimate expectations that his application for Electricity supply would be assessed and approved in accordance to long standing practices and the Law.
- (7) The Applicant has a legitimate expectation to be treated equally and to have his rights protected under the Law.

- (8) There has been procedural unfairness in that the Applicant's application for Electricity supply was denied for an inordinate length of time and upon enquiry and a request for clarification, he was refused an audience with the General Manager who ordinarily undertakes the responsibility to execute the mandate of the Board of the Respondent.
- (9) The Respondent's act or omissions constitute a breach of Natural Justice in that contrary to established legal principles of a separate legal entity, they arbitrarily determined that the Applicant and Bargain House Retail Outlet were one and the same in law.
- (10) The Respondent is Wenesbury Unreasonable in its refusal to approve the Applicant's application for Electricity supply, consequently and indirectly in full awareness, that its refusal would cause immeasurable financial hardship upon the Applicant, and that those decisions are not decisions that another person being armed with similar facts would come to.
- (11) The acts and/or omissions of the Respondent have directly and personally affected the Applicant by the decisions complained of.

[4] The Applicant filed an Affidavit in support of his application for judicial review dated 26th July, 2018 in which he details the history of the Respondent's company with his application for an Electricity supply to his residence.

[5] On the 25th September, 2018, the Respondent's filed an Affidavit in reply to the Applicant's Notice of Application, in the person of Stedmond Tross. Mr Tross stated that in or about the year 1997, the Applicant applied for the supply of Electricity on a property named Bargain House Retail Outlet of which he was a Director and shareholder. The Respondent stated that they created an Account NCB 578 which was transferred to the Applicant on the incorporation of that company.

[6] The Respondent asserts that Account number NCB 578 is in arrears in the sum of \$80,297.85, and was disconnected on the 23rd July, 2014, for non-payment of arrears. According to the Respondent, prior to the termination of Electricity to the property in question, the Applicant made several promises to settle his account that was in arrears with the Respondent, but always to no avail.

Additionally, a proposal was also made by the Applicant to the Respondent to rent a building, on the said property as a storage facility, and to set off the rent for the arrears; that proposal was declined by the Board of the Respondent.

[7] The Respondent also contends that the former premier of Nevis Mr Vance Amory did not advise of any meetings with the Applicant and there is no notation in any of the Respondent's Board minutes advising of any discussion with respect to the Applicant. Additionally, the Respondent asserts that Mr Amory was not responsible for the operations of the Respondent, and that the Respondent's operations are conducted by a Board of Directors as a private company.

[8] The Respondent asserts that the Applicant has only submitted one application for the provision of Electricity to the Respondent which is in his personal name.¹

[9] The Respondent contends that this is not a matter which is suitable for Judicial Review as there are Private Law remedies available to the Applicant which are more suitable for determination of any relief.

[10] The Respondent further contends that the Applicant has failed to explain why he has unreasonably delayed for four years from the date of disconnection of Electricity to the property to bring an action for Judicial Review, which delay is detrimental to any claim for Judicial Review.

The Respondent requests the Court to dismiss the Applicant's request for leave to apply for Judicial Review.

[11] **The Issues**

- (1) Is an application for leave to apply for Judicial review in this matter a proper recourse to the Applicant or does he have other private Law remedies at his disposal?
- (2) Should the Applicant be held personally liable for the debts of his company

¹ Exhibit ST2

which is indebted to the Respondent's company?

- (3) Has there been an unreasonable delay in bringing this application for leave to apply for Judicial Review?
- (4) Does the Court have Jurisdiction to review private companies for questionable conduct?
- (5) Has the Applicant satisfied the conditions to be granted leave to apply for Judicial Review?

The Law

[12] Judicial Review proceedings are regulated by part 56 of the Civil Procedure Rules 2000.

[13] It is settled Law that the appropriate test to be applied by the Court is stated in the case of **Sharma vs Brown-Antoine et al**².

The ordinary rule is that the Court will refuse leave to claim Judicial Review unless satisfied that there is an arguable ground for Judicial Review, having a realistic prospect of success, and not subject to a discretionary bar such as delay or an alternative remedy.³

[14] **Whether there are Alternative Remedies available to the Applicant?**

CPR 56 stipulates that an Applicant seeking leave to apply for Judicial Review must address whether or not it has any alternative remedy available to it, why that remedy is not being pursued and why Judicial Review is more appropriate.

[15] In **R vs Grace Bay II Holdings Sarl et al vs Pensions Regulators ABF Ltd (in Liquidation)**⁴ at paragraph 59 of the judgment, the Court found:

- (1) That the issue of Alternative remedy falls to be considered at the permission stage.
- (2) Where there is an Alternative remedy the Court would only entertain a

² [2006] UKPC 57

³ See: R vs Legal Aid Board ex parte Hughes [1992] 5 Admin LR 523

⁴ [2017] EWHC 7

Judicial Review, usually because the Court is satisfied that the Alternative remedy is for some reason clearly unsatisfactory.

- (3) That the Court will take into account whether granting permission in a case arising out of a regulatory procedure will lead to challenges in similar cases being pursued.
- (4) It is necessary for the Court to guard against granting Judicial Review merely because it may be more effective and convenient to proceed by way of Judicial Review. That would risk undermining the will of Parliament.
- (5) The Court should lean strongly against allowing an Applicant to proceed by way of Judicial Review in those cases where Parliament had provided a statutory appeal procedure designed to enable the substance of the dispute to be determined within a short time. In those cases, where there was an issue of public interest or public safety at issue, a successful application for Judicial Review was likely to perpetrate what might be a harmful state of affairs.
- (6) Where Parliament had provided a statutory remedy, it was important to identify the intended scope of the statutory provision. The Court would consider whether it was to be inferred that Parliament intended the statutory procedure to apply even in cases where it was alleged that the decision had been arrived at, in a way which could otherwise be challenged on Public Law grounds, because it enabled the real question to be decided.

[16] In **Benjamine Co Services Ltd vs Anguilla Financial Services Commission**⁵ the Court held that:

“There is a presumption against Judicial Review, where an alternative remedy exists and the Court may not grant leave where the Court forms the view that some other form of legal proceedings or Avenue of challenge is available. The most obvious type of substitute remedy is an Avenue of appeal or Review created by statute.”

⁵ [2008] ECCJ 34

[17] The Respondent argued that there is a statutory remedy available to the Applicant, and the Applicant has not illustrated why neither of those avenues are being pursued for relief and or why Judicial Review is deemed as more appropriate in the circumstances of this case.

The Respondent further contends that the burden is not on the Respondent to state that the alternative remedies are more suitable or are available: the burden is on the Applicant to illustrate that the alternative remedies are not available and to illustrate why Judicial Review is more suitable when alternative remedies are available.

[18] The Respondent also contends that the **Public Utilities Commission Ordinance Cap 5.01 (N)** (PUO) which governs the supply of Electricity states at section 5 of the PUO the functions of the Public Utilities Commission (PUC). At section 5 of the said Ordinance, it states as follows:

- (1) The Commission shall ensure that the services rendered by a public utility are satisfactory, and that any charges imposed in respect of those services are reasonable, and for this purpose the Commission shall have power:
 - (a) To enquire generally into the nature and extent of utility services, and to determine in accordance with this Ordinance the standards which must be maintained in relation to those services.
 - (b) To determine in accordance with this Ordinance, the rates which may be charged in respect of Utility Services.
 - (c) To require a public utility to prepare and put into effect such programs of development in relation to any undertaking it operates as may be required under its enabling laws.

[19] The Respondent asserts that the PUO does not deal solely with the determination of rates applicable to public utilities such as Electricity companies, but can enquire generally into the nature and extent of Utility services to determine the standards which must be maintained in relation to those services.

[20] The Applicant on the other hand asserts that there are no Private Law remedies available to the Applicant and submits that the PUO does not identify any remedy for the matters arising in the case at Bar.

The Applicant contends further that the said Ordinance governs the relationship between a Public Utility provider and the PUC with regard to rates and standards.

- [21] On a review of the PUO, it is clear that the scope of the legislation is to “ensure that the services rendered by a public utility are satisfactory and that any charges imposed in respect of those services are reasonable”.

In my considered opinion, the PUC does not have any authority to hear a member of the public who is aggrieved by a decision to deny an application for Electricity supply or to deal with a delay in the processing of an application for Electricity.

- [22] The Applicant states that there are no Private Law remedies in Contract or Tort which may be applicable, and that the Respondent has failed, neglected or refused to identify the available Private Law remedies available to it.

- [23] I do not share the Applicant’s assertion that the Respondent has not pointed out which Private Law remedies are available to it. That is not the role of the Respondent in my respectful opinion.

The Applicant has not advanced any reason why a Private Law remedy cannot be pursued and has failed to discharge the burden that is his to illustrate that no alternative remedies are available to him, and that Judicial Review is the more appropriate remedy.

- [24] **Can the Applicant be held personally liable for the debts of his company Bargain House Retail Outlet Limited which company is indebted to the Respondent?**

The Respondent has submitted that the Applicant and Bargain House Retail Outlet Limited are one at Law, and that when the Court looks to the substance of the Applicant’s premise for the relief sought, it is evident that this is a case where exceptions to the concept of separate legal personality arises, as this is an appropriate case for the piercing of the corporate veil.

[25] The Applicant contends that the company Bargain House Retail Outlet Limited and the Applicant are two different legal entities and that the Respondent's proposition defies the Law. The Applicant cites the case of **Dave Persad vs Anirudh Singh**⁶.

At paragraph 20 of the Judgment the Court held that the case of **Salomon vs Salomon & Co Ltd**⁷ applied, and that the case exposed the fallacy of the notion, that the Court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability.

One of the reasons that an individual either on their own or together with others will take advantage of limited liability is to avoid personal liability if things go wrong. If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice.

Lord Herschell also stated in that case that he was "at a loss to understand what is meant by saying that the company was an "Alias" for its shareholder and Director as the company is "not another name for the same person; the company is ex hypothesis "a distinct legal persona"."

[26] The Applicant contends that in 1997 the Applicant transferred his accounts into the name of Bargain House Retail Outlet Limited and that meant that the Respondent is well aware that they were not doing business with the Applicant personally. The Applicant further contends that the doctrine of separate legal entity precludes a person from being liable for any debts of a company in their private capacity.

The Applicant therefore asserts that the debt that was allegedly incurred by the Applicant was at all times, a debt owed by Bargain House Retail Outlet Limited, and that the Respondent should have pursued a claim against Bargain House Retail Outlet Limited for any debt owed to them.

Further according to the Applicant there is no evidence to indicate that Bargain House Retail Outlet Limited was formed to evade a pre-existing debt, neither did he agree to personally assume or guarantee the debts of the company.

⁶ [2017] UKPC 32

⁷ [1897] AC 22

- [27] The Respondent contends that there is impropriety on the part of the Applicant as confirmed in the Affidavits of Stedmond Tross and Jervan Swanston which illustrates that the concept of a separate legal personality is being used for a dishonest purpose. That dishonest purpose according to the Respondent was the Applicant's attempt to misuse the company as a device or façade to conceal his wrongdoing and obtain the supply of Electricity to his property without payment of the arrears sum.

Analysis

- [28] Judicial Review has often been said to be unsuitable for deciding disputed facts in general, questions of facts are for a fact adjudication body, and Judicial Review is suitable to deal with issues such as the rationality of the Judgment reached, whether relevant factors have been taken into account, whether sufficient opportunity has been given to the affected party to make representation.
- [29] The issue of dishonesty and impropriety on the part of the Applicant is an issue of Evidence of the relationship between the Applicant and the Respondent, and the intentions and actions of the Applicant. Applications for Judicial Review do not decide questions of lack of contested evidence, and generally only raise legal issues⁸.
- [30] It is my respectful opinion that piercing the corporate veil, to attempt to expose the Applicant's alleged dishonesty is a matter involving Private Law remedies and is wholly inappropriate for a Judicial Review process. Judicial Review is therefore an unsatisfactory tool for fact finding, given the availability of Private Law remedies⁹.

Unreasonable delay

- [31] Under CPR 56.5, it states that:

⁸ See: *Tweed vs Parades Commission for Northern Ireland* [2006] UKHL 53

⁹ See: *R vs Crown Court at Preston* [2008] EWHC 2832

- (1) In addition to any time limit imposed by an Enactment, the judge may refuse leave or to grant relief in any case in which the Judge considers that there has been unreasonable delay before making an application.
- (2) When considering whether to refuse or grant relief because of delay the Judge must consider whether the granting of leave would be likely to:
 - (a) Be detrimental to good Administration
 - (b) Cause substantial hardship to or substantially prejudice the rights of any person

[32] The Applicant submits that the delay was reasonable, and in any event delay was caused by the acts and/or omissions and assurances of the Respondent and/or its agents; and that a decision was only communicated to the Applicant in June 2018.

[33] The Applicant cites the case of **Roland Browne vs the Public Service Commission**¹⁰, where the Court of Appeal quoted Lord Bridge in **R vs Dairy Produce**¹¹:

“I do not consider that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good Administration; This is because applications for Judicial Review may occur in many different situations, and the need for finality may be greater in one context than in another.”

[34] In the above-mentioned case, the Court of Appeal held “that we have no rule in our Civil Procedure Rules 2000 which is comparable to the English order 53, Rule 4; Consequently the absence of any rigid time limit for invoking the supervisory jurisdiction in Saint Lucia is salutary, subject of course to the Court’s insistence on reasonable promptness in all the circumstances of each particular case, and rejection of stale claims”.

[35] In considering the issue of unreasonable delay by the Applicant, I lean on the Privy Council’s decision in the case of **The Honourable Patrick Manning and 17 others**

¹⁰ SLUHCVP [2010]/023

¹¹ [1983] 2AC 237

vs Chandresh Sharma¹² where a delay of four years before making the Judicial review application was not considered to be unreasonable in the circumstances of the case.

[36] Similarly, the Applicant's delay in bringing this application to Court was not unreasonable, having regard to his evidence that he had been meeting with a number of officials of the Respondent over the years.

I accept his evidence on that issue that it was only on the 13th June, 2018¹³ that a decision was communicated to him.

Does the Court have Jurisdiction to review Private companies for questionable conduct?

[37] The Respondent submits that Declarations are only available against Public Bodies and not private companies as prescribed in CPR 56.1(1)(b).

[38] The Authors of **De Smith's Judicial Review 8th Edition** at paragraphs 3-046 – 3-052 state that the public functions approach brings within the Court's Judicial Review supervisory Jurisdiction, some actions of some bodies, including self-regulatory organizations, charities and business enterprises, which would otherwise fall outside Public Law scrutiny.

Since 1987, the Courts have come to recognize that an approach based solely on the source of the Public Authority was too restrictive, and an additional approach to determine susceptibility to Judicial Review based on the **type of function** performed by the Decision maker.¹⁴

[39] In the case of **Gregor Julian vs Winfresh Ltd** the Court held that although the Respondent was a company registered under the Companies Act, what was the relevant question was whether the nature of the Act was private or public.

¹² PC Appeal No. 22 of 2008

¹³ Exhibit GPL 6

¹⁴ See: R vs Panel on Takeovers & Mergers Ex parte Datafin [1987] 1QB 815 CA

[40] The Applicant submits that the Respondent is a body incorporated by Statute and although wholly owned by the Nevis Island Administration, it performs a public function of supplying Electricity and is amenable to Judicial Review. Therefore the Applicant is entitled to the reliefs sought.

[41] The Respondent asserts that while they are the holder of a public supplier's license to supply Electricity, this is a Public Law function.

However, the question is whether or not the Respondent as a matter of fact is a State, Court, tribunal or public body against whom declaratory orders can be made.

Further CPR 56.1(1)(b) has narrowed the categories of litigants subject to this Court's jurisdiction for the purposes of granting declaratory relief, and the Respondent does not fall within the category defined.

[42] The Respondent also submits that the jurisdiction of the Court under the CPR 2000 can only be extended against private companies performing Public Law functions by legislation.

Therefore the Respondent submits that the Applicant's request for leave by way of Judicial Review to seek declaratory relief against the Respondent should be denied.

[43] I have reviewed all the authorities on this issue and concur with the Respondent's submission that while the Respondent, Nevis Electricity Co Ltd is a public supplier of Electricity, which has been granted a Public license to supply Electricity, that in itself does not make it a public entity, since it is not a creature of Statute, although it performs a Public Law function.

Offer of Electricity

[44] The Respondent has now submitted that the Applicant's application for Electricity has been approved on conditions, and the issue is now moot.

[45] The Applicant contends that this matter is still before the Courts and the decision being reviewed is the Acts and/or omissions of the Respondent in failing, neglecting

and or refusing to process the Applicant's application for an Electricity supply, prior to the offer being made.

[46] I am of the considered opinion that this current offer is beyond the jurisdiction of the Court and the Court will decline to consider this new and emerging issue, which only surfaced when the application for leave for Judicial Review was already being heard.

[47] While I have already concluded that Private Law remedies are available to the Applicant to pursue against the Defendant, I have also concluded based on the well settled law that there was no unreasonable delay by the Applicant in instituting proceedings against the Respondent for the reasons already given.

[48] In conclusion and based on the totality of the Evidence, I will decline to grant leave to the Applicant to apply for Judicial Review of the decision of the Respondent dated the 13th June, 2018.

[49] Each party to these proceedings shall bear its own costs.

[50] I extend my profound apologies for the delay in the delivery of this judgment.

Lorraine Williams
High Court Judge

By the Court

Registrar